00-1360 (4)

No. 00-

In the
SUPREME COURT OF THE UNITED STATES

NEW YORK STATE BOARD OF ELECTIONS,
Petitioner,

v.

ANITA LERMAN, and ANGELO D'ANGELO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANT BOARD OF ELECTIONS OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

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PRELIMINARY STATEMENT

The Board of Elections of the City of New York (the "City Board"), a defendant and appellee below, submits this brief in support of the New York State Board

of Election's petition for writ of certiorari, in compliance with the request of this Court.[1]

ARGUMENT

THE DETERMINATION OF THE COURT OF APPEALS RAISES THE QUESTION OF WHETHER A STATE ACTS CONSTITUTIONALLY PURSUANT TO THE FIRST AND FOURTEENTH AMENDMENT WHEN IT REQUIRES THAT A WITNESS TO A PARTY PRIMARY PETITION BE ELIGIBLE TO SIGN THE PETITION. THIS IS A QUESTION OF NATIONAL IMPORTANCE. ACCORDINGLY, CERTIORARI SHOULD BE GRANTED.

This case squarely presents the question of the reach of this Court's decision in Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 231 (1999), as posited by Chief Justice Rehnquist in dissent. Here, the question is whether a residency requirement for witnesses to candidate nominating petitions in a party primary violates the First Amendment as a matter of law.

[1] The City Board did submit briefs in support of its present position regarding New York Election Law §6-132(2) in both the District Court and the Court of Appeals.

The Court of Appeals ruled that it does. The City Board disputes that finding.

Contrary to the Court of Appeals' finding, witnessing initiative petitions is not the equivalent of witnessing candidate-nominating petitions. A ballot initiative is, by its nature, an issue of public interest. Simply presenting the question of whether a particular issue should become law is itself speech about a public issue that is likely to generate additional speech. Generating that discussion can be important to an initiative proponent regardless of whether or not the initiative actually achieves a place on the ballot.

By contrast, for a candidate seeking a party's nomination, the primary goal of a nominating petition is ballot access. There may be some interest in spreading the word that a particular candidate should be elected. However, there is no evidence that circulating a nominating petition is one of the more effective or efficient methods of accomplishing that goal. If access to the ballot is otherwise reasonably feasible, it seems unlikely that a candidate

would complain about a residency requirement for petition witnesses as an infringement on his ability to get his message out.

Nothing in the record here suggests that the residency requirement at issue unreasonably interferes with the effort to place a candidate on the ballot. This Court set forth the standard for evaluating the reasonableness of a regulation's impact on ballot access as follows:

> Could a reasonably diligent independent candidate be expected to satisfy the ... requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Storer v. Brown, 415 U.S. 724, 742 (1974).

Here, the complaint does not allege that the regulation at issue imposes an unreasonable burden on ballot access, and plaintiffs did not submit any evidence in support of such a position to the District Court.[2] To the

[2] This matter was before the Court of Appeals on appeal from the District Court's decision and order granting defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Rules of Federal Procedure. Plaintiffs did not submit any evidence or argument in opposition to the motion.

extent the Court of Appeals found such a burden, it was only by relying on the factual findings of the District Court in Molinari v. Powers, 82 F. Supp.2d 57 (E.D.N.Y. 2000). Such reliance is misplaced.

That case discussed Election Law §6-132(2) in the very particular circumstances of the 2000 Republican presidential primary. The difficulties at issue there are not applicable to other political races in the state.[3] Indeed, in a somewhat different context, the Second Circuit Court of Appeals noted that a number of independent bodies had succeeded in gaining access to the ballot in New York. Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994). The

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[3] In New York, the election of the Republican nominee for President, though of national interest, was designed as a series of local races for delegates from each of 31 congressional districts. This structure required the organization of each of these districts, including districts where the total number of Republicans is quite small. Taken together with other ballot access requirements, this fragmented structure placed a significant burden on a candidate's ability to secure a place on the ballot. This fragmentation does not affect any other political race in New York. Accordingly, the burden on ballot access presented by §6-132(2) in the 2000 Republican Presidential primary is limited to that contest.

regulation at issue here was in place in the years leading up to the decision in Schulz, and there is no indication that the ability of independent parties to obtain a place on the ballot has changed significantly since then. Accordingly, to the extent the Court of Appeals ruled §6-132(2) unconstitutional as posing an undue burden on ballot access, the Court erred.

Initiative petitions and candidate nominating petitions also differ in that a party primary implicates an associational right to exclude that a ballot initiative does not. This Court has recognized that a political party has the right to determine who will choose its standard bearer with the corresponding right to exclude those with whom it does not want to associate from the decision making process. California Democratic Party v. Jones, 530 U.S. 567 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986). This Court has also recognized a legitimate state interest in preventing party raiding. Rosario v. Rockefeller, 410 U.S. 752 (1973).

Similarly, there can be little doubt that only residents of a political subdivision can vote for a representative of that subdivision. See Montano v. Lefkowitz, 575 F.2d 378, 386 (2d Cir. 1978) (primary voters in district entitled to participate independent of "other districts having possibly divergent interests...."). None of these interests come into play when the issue is a ballot initiative of statewide significance.

The City Board submits that the right to limit who chooses the standard bearer for a political party in a political subdivision includes the right to similarly limit who may witness candidate nominating petitions. In this case, the restriction is to members of the party who are residents of the subdivision or notaries public, who act as neutral officials.[4]

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[4] A notary public or commissioner of deeds is a public officer appointed by the secretary of state, upon a determination that he is competent and of good moral character. Executive Law §§130, 131; People v. Rathbone, 145 N.Y. 434 (1895); Sinclair v. Division of Licensing of Dep't of State, 96 A.D.2d 1130 (3d Dep't), lve. denied, 60 N.Y.2d 559 (1983). A notary is empowered to administer oaths and affirmations. Executive Law §135. His

In opposition to the associational right of a particular political subdivision's party's right to limit who may participate in its primary stands the potential witness' right to associate across borders. Certainly, plaintiff Lerman does have a First Amendment right to express her support for the nomination of John Solazzo as council person from the 50th Council District, even though she does not reside in that district. It is considerably less clear that she has a constitutional right to take an active role in actually nominating him to represent a district other than her own. She may desire to do so, and she may have an intellectual interest in the outcome of the election. This does not, however, translate into cognizable interest in participating in another district's election, much less a right to do so.

This points to an additional distinction between the facts of this case and those of Buckley, the primary

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appointment thus authorizes him to act as a neutral witness to sworn documents. See Sumkin v. Hammonds, 177 Misc. 2d 1006 (Dist. Ct. Nassau Co. 1998).

authority on which the Court of Appeals relies. In Buckley, this Court made a distinction between being registered to vote and being eligible to vote. Buckley, 525 U.S. at 194, n. 16. In part, this distinction was based on the finding that the decision not to register to vote could itself have First Amendment significance. Id. at 195. That issue is not present here. In addition, regardless of whether one is registered, a person who is eligible to vote for an initiative will be affected by the result of that vote. By contrast, a resident of the 49th Council District has no cognizable interest in the results of the 50th Council District's election.

The purpose of a candidate-designating petition is to demonstrate that a particular candidate has significant local support, meriting a place on the ballot. Section 6-132(2) promotes this purpose. When those people willing to circulate a petition come from within the relevant subdivision, there is a greater indication of support from within that subdivision than exists when outsiders are circulating petitions to a passive populace.

The residency requirement also assists in the practical protection against fraud. As New York elections are governed, and records kept, largely at the local level, it is easier to verify signatures within a given district than across districts.

The Court of Appeals' finding that the current state of computer technology vitiates this argument is error. While the Boards of Election in New York State are now using signature imaging technology, records, including computer records, are still kept at the county level, except in New York city, where they are kept at the city level. New York has 57 counties outside of New York city. There is no integrated system allowing for the easy verification of signatures from far-flung corners of the state.[5] Accordingly, the Court of Appeals finding that the

[5] The City Board notes that the record before the Court contains no evidence regarding the state of the various county boards' computer systems or how easily information can be shared across counties. Indeed, the New York State Attorney General recently issued a report discussing the fact that counties currently do not have access to a statewide list of registered voters. Voting Matters in New York: Participation, Choice, Action,

residency requirement does not advance the state's interest in preserving the integrity of elections is error.

The residency requirement of §6-132(2) of New York State's Election Law does not severely burden the First and Fourteenth Amendment rights of candidates or potential petition witnesses. Moreover, it protects the associational rights of local political parties, and advances the state interest in preserving the integrity of elections. As the issues raised are unsettled and of national significance, this Court should grant certiorari. Upon a grant of certiorari, this Court should reverse the holding of the Court of Appeals.

Integrity, Office of Attorney General Eliot Spitzer, February 12, 2001 at 12-14.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

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